

COVERAGE ISSUES

PROPOSAL #1 – VOLUNTARY COVERAGE REQUIREMENT

It is the recommendation of the study group that employers not be required to obtain workers' compensation insurance coverage. Employers may elect to obtain workers' compensation coverage on themselves or their employees.

Pros:

Cons:

Vote:

PROPOSAL #1A – VOLUNTARY COVERAGE FOR CONSTRUCTION

The Workers' Compensation Act does not apply to anyone performing services in the construction industry as defined in 39-71-116(9). Employers may elect to obtain workers' compensation coverage on themselves or their employees.

Pros:

Cons:

Vote:

PROPOSAL #2 – MANDATORY COVERAGE FOR WORKERS

It is the recommendation of the study group that workers' compensation coverage be mandatory for all workers performing services for Montana businesses.

Pros:

Cons:

Vote:

PROPOSAL #2A – MANDATORY COVERAGE FOR WORKERS BUT MAINTAIN CURRENT EXEMPTIONS (STATUS QUO)

It is the recommendation of the study group that workers' compensation coverage be mandatory for all workers performing services for Montana businesses, with the exception being for those currently exempt from the law.

Pros:

Cons:

Vote:

PROPOSAL #2B – MANDATORY COVERAGE FOR CONSTRUCTION

It is the recommendation of the study group that workers' compensation be mandatory for everyone working in the construction industry as defined in 39-71-116(9). This includes employees, sole proprietors, partners, corporate officers, managers and members of LLC's.

Pros:

Cons:

Vote:

PROPOSAL #2C – MANDATORY COVERAGE FOR OTHER SPECIFIC INDUSTRIES

It is the recommendation of the study group that workers' compensation be mandatory for the following industries:

Pros:

Cons:

Vote:

EXEMPTION PROCESS

PROPOSAL #3 – ELIMINATE THE INDEPENDENT CONTRACTOR REGISTRATION PROCESS

It is the recommendation of the study group that the independent contractor registration process be eliminated.

Pros:

Cons:

Vote:

PROPOSAL #4 – CONTINUE THE STATUS QUO

It is the recommendation of the study group that the independent contractor registration process continue in its current form.

Pros:

Cons:

Vote:

The current law defining independent contractors reads:

(1) An “independent contractor” is one who renders service in the course of an occupation and:

- (a) has been and will continue to be free from control or direction over the performance of services, both under the contract and in fact; and**
- (b) is engaged in an independently established trade, occupation, profession, or business.**

(2) An individual performing services for remuneration is considered to be an employee under this chapter unless the requirements of subsection (1) are met.

PROPOSAL #5 – REPEALER OF DEFINITION OF INDEPENDENT CONTRACTOR

It is the recommendation of the study group that the current law be amended to repeal the definition of independent contractor.

Pros:

Cons:

Vote:

PROPOSAL #5A – PARTIAL REPEALER OF THE DEFINITION OF INDEPENDENT CONTRACTOR

It is the recommendation of the study group that the (a) portion of the statutory definition of independent contractor be repealed.

Pros:

Cons:

Vote:

PROPOSAL #5B – ADDITION OF THE OLD (c) PORTION OF THE INDEPENDENT CONTRACTOR EXEMPTION.

It is the recommendation of the study group that the existing definition of an independent contractor be amended to include that in addition to (a) and (b) an independent contractor “has received an exemption granted under 39-71-401(3)”.

Pros:

Cons:

Vote:

PROPOSAL #5C – ADDITION OF THE OLD (c) PORTION OF THE INDEPENDENT CONTRACTOR EXEMPTION TO CONSTRUCTION INDUSTRY EMPLOYMENT.

It is the recommendation of the study group that the existing definition of an independent contractor for those engaged in the construction industry be amended to include that in addition to (a) and (b) an independent contractor “has received an exemption granted under 39-71-401(3)”.

Pros:

Cons:

Vote:

PROPOSAL #6 – USE OF THE AFFIDAVIT FOR EXEMPTION

It is the recommendation of the study group that the Department of Labor and Industry continue to use the affidavit for exemption, with refinements as discussed in study group meetings, for those applicants who demonstrate the payment of business taxes.

Pros:

Cons:

Vote:

PROPOSAL #7 – DOCUMENTATION

It is the recommendation of the study group that the Department require documentation to establish eligibility for independent contractor status for all new or renewal applications that cannot demonstrate payment of business taxes.

Pros:

Cons:

Vote:

PROPOSAL #8 – WORKERS’ COMPENSATION MEDICAL POLICY REQUIRED TO GAIN EXEMPTION

It is the recommendation of the study group that in order to receive an independent contractor exemption an applicant must obtain, at a minimum, a workers’ compensation policy providing medical coverage. The policy must be maintained at all times when performing work as an IC.

Pros:

Cons:

Vote:

PROPOSAL #9 – LIABILITY INSURANCE REQUIRED TO GAIN EXEMPTION

It is the recommendation of the study group that in order to receive an independent contractor exemption an applicant must obtain an employers’ general liability insurance policy in an amount to be determined. The liability policy must be maintained whenever the independent contractor is performing work as an IC.

Pros:

Cons:

Vote:

PROPOSAL #10 – CONCLUSIVE NATURE OF THE INDEPENDENT CONTRACTOR EXEMPTION

It is the recommendation of the study group that when an application for exemption is approved by the department it is conclusive as to the status of the independent contractor. This recommendation is consistent with the language drafted by Larry Jones and discussed in committee.

Pros:

Cons:

Vote:

PROPOSAL #11 - REBUTTABLE PRESUMPTION OF THE INDEPENDENT CONTRACTOR EXEMPTION

It is the recommendation of the study group that when an application for exemption as an independent contractor is approved by the department there is a rebuttable presumption that the holder of that exemption is an independent contractor and not an employee. This recommendation is consistent with the language drafted by Kevin Braun and discussed in committee.

Pros:

Cons:

Vote:

PROPOSAL #11A – STANDARD OF PROOF TO OVERCOME THE INDEPENDENT CONTRACTOR EXEMPTION – PREPONDERANCE OF THE EVIDENCE

It is the recommendation of this committee that the standard of proof necessary to overcome the exemption for independent contractor status approved by the department must be that as shown by the preponderance of the evidence. (a degree of proof which is more probable than not)

Pros:

Cons:

Vote:

PROPOSAL #11B – STANDARD OF PROOF TO OVERCOME THE INDEPENDENT CONTRACTOR EXEMPTION – CLEAR AND CONVINCING EVIDENCE

It is the recommendation of this committee that the standard of proof necessary to overcome the exemption for independent contractor status approved by the department must be that as shown by clear and convincing evidence. (truth of the facts asserted must be highly probably – more than a preponderance)

Pros:

Cons:

Vote:

PROPOSAL #11C – STANDARD OF PROOF TO OVERCOME THE INDEPENDENT CONTRACTOR EXEMPTION – BEYOND A REASONABLE DOUBT

It is the recommendation of this committee that the standard of proof necessary to overcome the exemption for independent contractor status approved by the department must be that as shown beyond a reasonable doubt. (to refute the certificate one must be entirely convinced; clear, precise, indubitable; beyond a moral certainty)

Pros:

Cons:

Vote:

PROPOSAL #12 – PRESUMPTION OF EMPLOYMENT

It is the recommendation of the study group that, if there is a dispute over employment status, the burden is on the party claiming the exemption to prove the relationship between the parties was other than employer to employee.

Pros:

Cons:

Vote:

PROPOSAL #12A – STANDARD OF PROOF TO OVERCOME THE PRESUMPTION OF EMPLOYMENT STATUS – PREPONDERANCE OF THE EVIDENCE

It is the recommendation of this committee that the standard of proof necessary to overcome the presumption of employee status must be that as shown by the preponderance of the evidence. (a degree of proof which is more probable than not)

Pros:

Cons:

Vote:

PROPOSAL #12B – STANDARD OF PROOF TO OVERCOME THE PRESUMPTION OF EMPLOYMENT STATUS – CLEAR AND CONVINCING EVIDENCE

It is the recommendation of this committee that the standard of proof necessary to overcome the presumption of employee status must be that as shown by clear and convincing evidence. (truth of the facts asserted must be highly probably – more than a preponderance)

Pros:

Cons:

Vote:

PROPOSAL #12C – STANDARD OF PROOF TO OVERCOME THE PRESUMPTION OF EMPLOYMENT STATUS – BEYOND A REASONABLE DOUBT

It is the recommendation of this committee that the standard of proof necessary to overcome the presumption of employee status must be that as shown beyond a reasonable doubt. (to refute the certificate one must be entirely convinced; clear, precise, indubitable; beyond a moral certainty)

Pros:

Cons:

Vote:

PROPOSAL #13 – PROVISIONAL EXEMPTION PROCESS

It is the recommendation of the study group that if either conclusive presumption or rebuttable presumption is used to determine employment status that a six month provisional exemption be provided by the Department of Labor and Industry to those not previously registered or not clearly engaged in an independently established trade, profession or business. As part of this recommendation the affidavit for exemption would continue to be used. Additionally, the Department, in conjunction with interests represented in the study group membership, would develop additional standards for provisional registration.

Pros:

Cons:

Vote:

PROPOSAL #13A – MEMORANDUM OF AGREEMENT-PROVISIONAL LICENSEES

As part of a provisional licensing process the study group recommends that a signed Memorandum of Agreement, as discussed in the committee, be required of all provisional licensees for work performed under the provisional license.

Pros:

Cons:

Vote:

EDUCATION

PROPOSAL #14 – MEMORANDUM OF AGREEMENT

The study group recommends that the Memorandum of Agreement, as discussed in the committee, be made a part of any education and informational efforts by the Department of Labor and Industry by encouraging independent contractors to voluntarily enter into a signed memorandum of agreement with each hiring agent for all work performed as an independent contractor.

Pros:

Cons:

Vote:

PROPOSAL #15 – OUTREACH

It is the recommendation of the study group that the Department of Labor and Industry continue existing outreach education efforts and implement suggestions made by the study group. It is further recommended that such other education efforts as may be developed in conjunction with interests represented in the study group membership be implemented by the Department of Labor and Industry. Such efforts should pay particular attention to the control – “A” portion of the test for exemption. The efforts should include those explained to the group including such things as meetings with associations and trade organizations, assistance to business clinics and yearly public service announcements to air on radio and television.

Pros:

Cons:

Vote:

ENFORCEMENT

PROPOSAL #16 – DEPARTMENT ENFORCEMENT

As part of the recommendation on the conclusive nature of the exemption, it is the recommendation of the study group that the Department of Labor and Industry develop methods to ensure compliance with parts A and B of the test for independent contractor status. It is the further recommendation that those methods be developed in conjunction with this group, and to the extent possible, be incorporated in administrative rule.

Pros:

Cons:

Vote:

PROPOSAL #17 – SINGLE INITIAL EMPLOYMENT STATUS DETERMINATION

It is the recommendation of the study group that the Department of Labor and Industry continue the Independent Contractor Central Unit (ICCU) in order to conduct initial

investigations and make determinations when a dispute over employment status arises. The study group encourages participation in the ICCU by all programs in the Department of Labor and the Department of Revenue where employment status becomes an issue. This includes tax liability; UI tax liability; workers' compensation; wage and hour; and human rights.

Pros:

Cons:

Vote:

PROPOSAL #18 – DEFINING BUSINESS/SOLE PROPRIETOR/INDEPENDENT CONTRACTOR EXEMPTION AND PROVIDING FOR PROVISIONAL REGISTRATION – The study group recommends that "owners of 20% or more of business entities currently registered with the secretary of state or certified as business entities by the department are exempt" from the requirement to be insured under WC. The department shall adopt rules to define business entities and may certify new entities for a provisional period of time.

Pros:

Cons:

Vote:

SOME POSSIBLE LANGUAGE AS AN ADJUNCT TO PROPOSAL #18:

39-71-116 (31) "Sole proprietor" means the person who has the exclusive legal right or title to or ownership of a business ~~enterprise~~ entity. "Sole proprietor" may also mean the person who has the exclusive legal right or title to or ownership of a business entity and is the holder of an exemption issued by the department under 39-71-401.

39-71-401 (2) (d) stays the same and reads - - - (2) Unless the employer elects coverage for these employments under this chapter and an insurer allows an election, the Workers' Compensation Act does not apply to any of the following employments: - - - (d) employment of sole proprietors, working members of a partnership, working members of a limited liability partnership, or working members of a member-managed limited liability company except as provided in subsection (3)

39-71-401 (3)(a) will read the same as current except to delete the words sole proprietor: ~~A sole proprietor~~ working member of a partnership, a working member of a limited liability partnership, or a working member of a member-managed limited liability company who represents to the public that the person is an independent contractor shall elect to be bound personally and individually by the provisions of compensation plan No. 1,2, or 3 but may apply to the department for an exemption from the workers' Compensation Act.

Add a new (3)(f) Sole proprietor exemption. A person who has the exclusive legal right or title to ownership of a business enterprise shall be deemed a sole proprietor by the department and if engaged in an established trade, occupation, profession or business the provisions of 39-71-120 (a) are not applicable.

Add a new (3)(f)(i) a person deemed by the department to be a sole proprietor shall, upon proper application, be issued an exemption. A person determined by the department to not have exclusive legal right or title to ownership of a business enterprise, or a person who is not engaged in an independently established trade occupation, profession or business may be denied an exemption by the department. In the instance of sole proprietors not previously established the department may provide for a provisional sole proprietor exemption. The provisional exemption will be for a period not to exceed 6 months. At the conclusion of this period the applicant may make application for a full exemption, which may also be approved or denied by the department.

As a subset to all this you could spell out that the fee would be the same, or whatever and you could also spell out that the person contracting with the provisional applicant ought to take special care and/or even that during the provisional period the hiring agent ought to elect coverage and/or otherwise make sure both the a and b provisions were met. Maybe coverage ought to even be mandated during this provisional period??? There already is an appeal mechanism which would have to include any of this process as well.